

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MARVIN ROY FELDMAN,

Plaintiff,

v.

POKERTEK, INC.,

Defendant.

2:09-cv-01598-JCM-LRL

O R D E R

Before the court is plaintiff Marvin Roy Feldman's Response to the Court's Order To Show Cause (#55). (#56). Replies were due on May 11, 2012, and defendant PokerTek, Inc. did not file a reply.

Background

Plaintiff filed his complaint on August 21, 2009, asserting claims against defendant PokerTek for (1) breach of contract, (2) quantum meruit, (3) unjust enrichment, and (4) fraud. (#1). On October 13, 2009, PokerTek filed its answer, asserting thirty-three affirmative defenses. (#8). The deadline for filing the discovery plan and scheduling order was November 27, 2009. *Id.* On February 16, 2010, plaintiff filed a discovery plan and scheduling order, stating that defendant agreed upon the deadlines therein. (#10). The discovery plan set the close of discovery on June 18, 2010, a dispositive motions deadline of July 12, 2010, and a joint pretrial order deadline of August 12, 2010. *Id.* The court entered the discovery plan and scheduling order on February 22, 2010. (#11).

On March 12, 2010, the plaintiff filed a motion for leave to supplement the complaint. (#14). The plaintiff's proposed amended complaint included additional claims for breach of the covenant of good faith and fair dealing, tortious bad faith/ tortious breach of the covenant of good faith and fair dealing, and civil conspiracy to suppress evidence/tamper with witnesses. *Id.* Defendant PokerTek did

1 not file an opposition. On April 8, 2010, the court granted the plaintiff's motion (#15), and the clerk
2 filed plaintiff's amended complaint (#16). On May 4, 2010, plaintiff filed a three day notice of intent
3 to take default, asserting that "unless [defendant] answer or otherwise plead in response to [p]laintiff's
4 [f]irst [a]mended [c]omplaint on file herein within three (3) days of the filing of this Notice, [p]laintiff
5 will seek entry of default..." (#18).

6 On May 6, 2010, defendant filed its answer to plaintiff's first amended complaint asserting fifty-
7 six affirmative defenses. (#19). The deadline to file the discovery plan and scheduling was June 20,
8 2010. *Id.* On May 19, 2010, plaintiff filed a motion to extend discovery deadlines, asserting that the
9 extension is necessary, because plaintiff has not had an opportunity to conduct discovery on its
10 additional claims for relief and defendant's affirmative defenses, plaintiff has not received complete
11 answers to written discovery, and defendant set a deposition for the day before discovery ends. (#22).
12 On July 8, 2010, the court issued an order extending the deadline for conducting fact discovery to
13 September 10, 2010, setting a dispositive motions deadline for October 12, 2010, and the joint pretrial
14 order deadline for November 15, 2010. (#26).

15 On October 8, 2010, the plaintiff filed a motion to compel defendant's discovery responses, to
16 extend plaintiff's fact discovery, for an order that defendant produce Roberto Correa Mendez for
17 deposition, and for sanctions. (#30). On October 12, 2010, defendant filed a motion for summary
18 judgment. (#31). On November 15, 2010, the parties filed a stipulation and order to extend time to file
19 joint pretrial order, asking the court to extend the deadline in which to file the joint pretrial order to
20 thirty days after the latter of the entry of an order on plaintiff's motion to compel, or entry of an order
21 on defendant's motion for summary judgment. (#35). On November 17, 2010, the court signed the
22 stipulation granting the extension. (#36).

23 On November 30, 2010, the court entered an order granting in part and denying in part plaintiff's
24 motion to compel (#30), and ordering defendant to respond without objection to plaintiff's first, second
25 and third requests for production of documents no later than December 8, 2010. (#38). The court also
26 extended the plaintiff's fact discovery deadline until January 13, 2011. *Id.* On February 9, 2011, the

1 court denied defendant's motion for summary judgment (#31) for failure to authenticate the contact in
2 dispute pursuant to *Orr v. Bank of America NT & SA*, 285 F.3D 764 (9th Cir. 2002). (#39). The joint
3 pretrial order was due within thirty days from the entry of that order. On March 11, 2011, the parties
4 filed a stipulation and order to extend time to file the pretrial order. (#40). The parties asserted that the
5 joint pretrial order deadline "should be extended to March 31, 2011, to enable the parties to resolve
6 certain discovery issues, including document disclosures that may be designated and discussed as trial
7 exhibits, and to thereby provide the [c]ourt with a more complete [p]retrial [o]rder." *Id.* The court
8 signed the stipulation on March 15, 2011. (#41).

9 On March 31, 2011, the date the joint pretrial order was due, the parties filed another stipulation
10 to extend the deadline to file the joint pretrial order to April 30, 2011, asserting the same grounds for
11 the extension as in the previous stipulation. (#42). The court signed the stipulation on April 4, 2011.
12 (#43). The April 30, 2011, deadline passed, and the parties did not file a joint pretrial order. On May
13 2, 2011, plaintiff filed a motion to compel production of documents and for sanctions. (#44). Plaintiff
14 asserted that filing the motion was necessary, because "[f]ollowing prior motions to compel this
15 defendant to participate in good faith discovery, all granted by this court, and defendant's half-hearted
16 compliance with such order, plaintiff determined that no useful information concerning defendant's
17 revenues in Mexico...had been disclosed." *Id.* Plaintiff also argued that defendant did not comply with
18 the court's previous order requiring responses without objection (#38), and that defendant's responses
19 were, "at best," "passive aggressive." *Id.* Plaintiff asked this court to enter sanctions against defendant
20 for its practice of being "pervasively and consistently contemptuous of the adversarial process, the rules
21 of such process, and the order of the court governing that process, since the commencement of the
22 action." *Id.* Defendant filed a counter-motion to strike (#46), and the parties fully briefed the motions
23 (#45, #47, #48, and #49).

24 On September 29, 2011, the court entered an order holding "that defendant's documents
25 purporting to be responsive to plaintiff's requests are unresponsive and irrelevant, and amount to a
26 "failure to disclose, answer, or respond" under Rule 37(a)(4)(a)." (#50). The court ordered defendant

1 to provide documents that are responsive to plaintiff's requests within ten days from the entry of the
2 order. *Id.* The court also stated that the court "is bewildered by defendant's production of material that
3 is utterly useless and that only serves to force plaintiff's counsel to spend needless hours attempting to
4 weed through them," and that the court "will not tolerate future such gamesmanship, and will not
5 hesitate to recommend that default judgment be entered against defendant if such conduct continues."
6 *Id.* The court held with regard to sanctions, that "the court *at this time* concludes that striking
7 [defendant's] answer is too severe a sanction," but that "in light of the defendant's disregard for court
8 orders and continuous failure to meaningfully participate in discovery, the court finds that significant
9 monetary sanctions are in order." *Id.*

10 The court ordered plaintiff to provide the court with an affidavit demonstrating the "reasonable
11 expenses, including attorney's fees," that were incurred due to defendant's failure to disclose the
12 requested documents. Fed. R. Civ. P. 37(c)(1)(A)." *Id.* The court also denied defendant's motion to
13 strike (#46). *Id.* Plaintiff filed an affidavit pursuant to the court's order (#51), and defendant filed an
14 objection thereto (#53). On December 2, 2011, the court ordered defendant to pay \$15,000 within
15 fourteen days from the entry of the order. (#54). On April 19, 2012, the court entered an order to show
16 cause as to why the complaint should not be dismissed for failure to comply with the court's order (#43)
17 setting the joint pretrial order deadline for April 30, 2011. (#55). The order required that the parties,
18 on or before May 1, 2012, must "show cause why this case should not be dismissed for failure to comply
19 with the local rules and a court order." *Id.* On May 1, 2012, plaintiff filed his response to the court's
20 order to show cause. (#56). Defendant did not file a reply.

21 **Plaintiff's Response To The Order To Show Cause (#56)**

22 Plaintiff asserts that "good cause" exists for the failure to file a pretrial order in accordance with
23 the court's order. (#56). Plaintiff states that it is clear that the purpose of the stipulation to extend
24 deadlines (#43) was to "enable the parties to resolve certain discovery issues, including document
25 disclosures that may be designated and discussed as trial exhibits, and to thereby provide the [c]ourt
26 with a more complete [p]retrial [o]rder," and that it is also clear that the parties were unable to resolve

1 the discovery issues prior to the April 30, 2011, deadline, because plaintiff was forced to file a motion
2 to compel and for sanctions on May 2, 2011 (#44). *Id.* Plaintiff argues that since the defendant's
3 discovery responses were inadequate, the pretrial order "was not possible" on April 30, 2011, and the
4 motion to compel was necessary. *Id.* The court issued an order on the motion to compel on September
5 29, 2011 (#50), and the court ordered defendant to pay plaintiff's reasonable attorney's fees in the
6 amount of \$15,000 on December 2, 2011 (#54). Plaintiff explains that the pretrial order was not filed
7 because "neither of the orders adjudicating the [m]otion to [c]ompel (Doc. 50 nor Doc. 54) reset the
8 time for the pretrial order," and the plaintiff "interpreted the filing of [p]laintiff's [m]otion to [c]ompel
9 to sufficiently highlight the passing of the date for the pretrial order, and detail[] reasons the pretrial
10 order had not been timely completed." *Id.*

11 Plaintiff asserts that since the time the court issued its order regarding the payment of attorney's
12 fees (#54), the defendant has not "fully complied with its disclosure requirements," and the parties have
13 engaged in protracted settlement discussions. (#56). Plaintiff requests that the court enter a revised
14 pretrial order deadline on or around September 2012, and asserts that the pretrial order is not possible
15 at this time in light of defendant's incomplete discovery responses. *Id.* Plaintiff argues that there "is
16 no evidence of lack of diligence of [p]laintiff's part," and that plaintiff "anticipated to prompt a resetting
17 of the time-lines" when he filed his motion to compel (#44). *Id.* Plaintiff states that resetting the
18 scheduling order will provide an opportunity for the parties to continue settlement negotiations, and,
19 in the event settlement negotiations fail, for plaintiff to resolve the outstanding discovery issues,
20 enabling a complete pretrial order. *Id.*

21 Accordingly, and for good cause shown,

22 IT IS ORDERED that, within fourteen (14) days from the entry of this order, the parties shall
23 file a joint status report regarding defendant's compliance with the court's orders relating to plaintiff's
24 motion to compel and for sanctions (#50 and #54). Plaintiff shall include a statement of what discovery
25 is needed from defendant before the parties are able to file the joint pretrial order.

26 IT IS FURTHER ORDERED that a hearing is scheduled for June 4, 2012, at 10:00 a.m. in

1 Courtroom 3C.

2 DATED this 14th day of May, 2012.



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4 **CAM FERENBACH**
5 **UNITED STATES MAGISTRATE JUDGE**
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